AJC-AJJ
ASSOCIATION OF JUSTICE COUNSEL
ASSOCIATION DES JURISTES DE JUSTICE

Press Clippings for the period of February 23 to March 2, 2015
Revue de presse pour la période du 23 février au 2 mars, 2015

Here are articles and opinion pieces that might be of interest to AJC members
Voici quelques articles et textes d'opinion qui pourraient intéresser les membres de l'AJJ

OTTAWA CITIZEN

Women reach top in PS but lack clout male counterparts had, study shows

Kathryn May, Ottawa Citizen, February 23, 2015

Women have made it to the upper rungs of Canada's public service in numbers few other countries can claim only to find they don't have the power and policy clout that men enjoyed when they ran the show.

It's one of the many paradoxes uncovered by Carleton University researchers Marika Morris and Pauline Rankin in an interim report on a study of female leadership in the public service where women now dominate, holding more than 55 per cent of all jobs and 45 per cent of the executive positions below deputy ministers.

The study is part of the Women in the Public Service Project, run by the Washington-based Wilson Centre, aimed at getting women into 50 per cent of the world's public service jobs by 2050.

Canada stands out with a public service that already exceeds the 50 per cent female target. The study is examining the impact women are having on shaping the public service and finding ways to measure it. The report is a springboard for such a debate at Carleton on Tuesday.

"With women accounting for 45 per cent of the executive rank, we no longer ask how to get more women in the public service but what difference it makes having them there," said Morris.

The proportion of women in the public service is bigger than its share of the broader labour force and all signs are the trend will grow. Most of today's university graduates are women, and departments are hiring and promoting more women than men.

The study, based on interviews with former and current executives, also coincides with the 25th anniversary of a milestone report, Beneath the Veneer, written by the Task Force on Barriers in the Public Service.

Men ran the show during what's called the public service's heyday or "golden age" of big ideas and policies that shaped Canada — medicare, old age security, Canada Pension Plan. Married women couldn't work in the public service until 1955 and the first woman didn't even reach the executive level until 1972.

Women's ascendancy into executive ranks was slow. It reached 14 per cent when the task force report came out in 1990. The big surge came after 1996, when the number of women stepping up into executive suite jumped 137 per cent.

But that's also when public servants started losing their monopoly grip on policy and as the sole, trusted advisers to ministers.

"So just as women are entering senior levels, it is harder now than ever to have an impact," said Morris.

Women who took executive jobs over the past decade arrived just as developing big policy ideas took a back seat to economic restraint. Accountability, spending and job cuts, and avoiding risks were the order of the day.

It's also a time when the trust between politicians and bureaucrats is low.

"I heard a lot about changes in the past 10 years, less trust and diminished policy-making role, so now that more women … have made their entry into management, they have less responsibility to actually create policy and programs than public servants had in the past," said Morris.

She said women also moved into the senior jobs with a management style at odds with the hierarchy and traditional lines of accountability. Morris said many executives — both men and women — interviewed felt they "made a difference" and that often the biggest impact they had came from being "collaborative" leaders.

She said all the interviewees felt they had an impact when the workplace ran on "trust, openness, courage, persistence, networks, collaboration and mentorship." It was the rigid rules and structure that get in the way and stop risk-taking.

"The people I talked to were so enthusiastic they made you want to be a public servant. They were frank about what doesn't work, but they were committed, felt they made a difference.

"But what holds them back is the structure, culture of fear and onerous accountability" said Morris.

This collaborative style of management, long associated with women, also raises the question whether women have now reached such a critical mass that their style has become the norm within the public service. Morris said that if collaborative leaders are the way of the future, then the public service must wrestle with how to change and flatten the hierarchy so they manage better between departments.

Still, women's progress doesn't extend to the very top, where only one-third of deputy ministers are women. Morris said some interviewees called this level a "club" where a particular "mindset" prevails.

"So you don't have to be an old boy to get into the old boys' club anymore, but you have to have a certain way of thinking," she said. "You have to ask what measures can be taken to broaden views of what leadership looks like."

Morris said the study's participants agreed generous "family-friendly" benefits in the public service, such as maternity and parental leave, coupled with managers who understand family responsibilities, helped women's advancement.

That's an advantage many women don't have in the private sector. In fact, the Conservative government has promised to bring the public service's pay and benefits in line with the private sector.

Morris said she was surprised that some women felt equality had already been achieved. They also didn't want their accomplishments defined by their gender.

This contradicts previous studies that found gender differences among senior bureaucrats on issues such as the environment, economic inequality and the fiscal imbalance, she said.

Statistics show there is still a wage gap between the sexes, and women remain the main victims of harassment and sexual offences. Polling data show women have different voting patterns than men.

Morris said a question up for debate is whether the benefits, protection of unions, and the higher education of female public servants might have put them out of touch with women who don't have those advantages.

"Can they still be seen as representative of women if they do not share the socioeconomic or workplace conditions that the majority of Canadian women face?" Morris asked.

Brunt of public service cuts outside of Ottawa, report finds

Kathryn May, Ottawa Citizen, February 26, 2015

Canada's public service has become increasingly Ottawa-centric, with federal employees at regional operations bearing a disproportionate share of job cuts over the past three years.

The Parliamentary Budget Office's latest report on the government's supplementary estimates shows personnel costs, which peaked in 2012, fell with the elimination of nearly 21,000 jobs after the Conservatives implemented their cost-cutting 2012 budget.

The cuts of the past two years, however, show public servants working outside of the National Capital Region took a disproportionate hit.

The capital region has emerged with more than 42 per cent of all federal jobs now located here.

"The bottom line is that, proportionately, there have been more cuts in the regions than in the NCR," said Mostafa Askari, assistant parliamentary budget officer.

The report found about two-thirds of the job cuts were outside the National Capital Region, where the head offices of most departments and agencies are located.

Overall, the number of jobs in the federal public service has fallen by 7.5 per cent – 6.5 per cent in the National Capital Region – since the 2012 restraint budget.

At that time, the government said 70 per cent of the reductions would come from operational and "back office" efficiencies and wouldn't even be noticed by most Canadians. The regions, where most of the front-line employees work providing programs and services to Canadians, were to be largely unaffected.

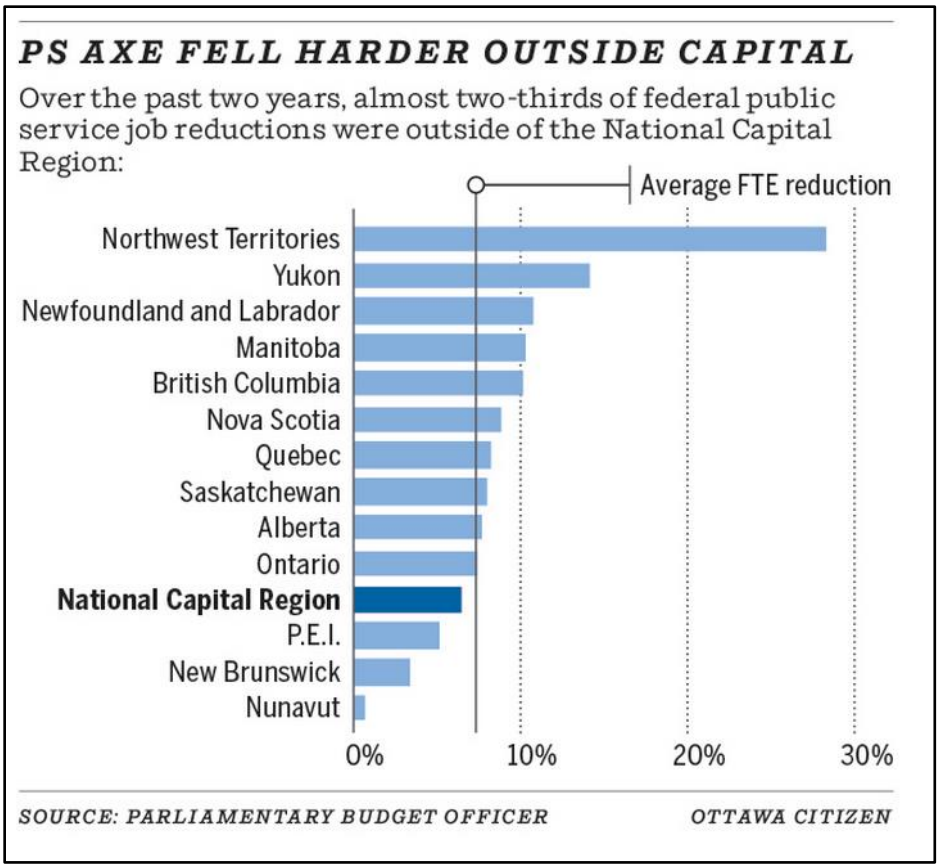
The bulk of the job cuts were supposed to come in the Ottawa area, where the size of the public service has mushroomed over the past decade. The government estimated that 12,000 bureaucrats would be laid off and the remaining 7,000 cuts would be through its five per cent yearly attrition rate.

The PBO offered no explanation as to why a larger portion of the public service has shifted to the national capital or whether this indicated a shift in the nature of work. The public service has changed considerably, becoming more "professional" in hiring new employees and facing an unprecedented generational turnover as baby boomers retire.

The public service has come under fire for being too Ottawa-focused, isolated and out of touch with Canadians. A big focus of the modernization of the public service now underway is to consult and collaborate more when making decisions.

The government has historically had about one-third of the public service in the Ottawa-Gatineau area and the remaining two-thirds in regional operations across the country.

The trend started to shift in 2000 when 35 per cent of the jobs were located in the National Capital Region. It reached 39 per cent in 2006, when the Conservatives came to power, and climbed to 41 per cent in 2010. The recent cuts helped accelerated that shift to 42 per cent.



The biggest increase in the size of the public service came under the Conservative watch from 2006 to 2011, peaking in 2010 as jobs were added in key priority areas such as security, defence and corrections. The government began cutting back with operating freezes, program review and the spending cuts of the 2012 budget.

Although the Conservatives have grown the public service more than any government in the past 20 years, some say the government could reverse much of that growth by the

time the cumulative impact of the cuts rolls out by 2017-18. Departments are poised to lose another 9,000 jobs by then.

It's unlikely the final impact of those cuts will significantly change the proportional distribution of jobs across the country.

Public service pay and benefits also accounts for the biggest portion of the $1.8 billion in new funding Treasury Board is seeking from Parliament in the latest supplementary estimates.

It has asked for $646 million, with the biggest portion going to reimburse the $400 million departments spent in cashing out employees for the severance pay they had accumulated before the Conservatives scrapped the benefit. Employees accumulated one week of pay for every year worked which they could collect when they voluntarily left, resigned or quit the public service.

The PBO report said this benefit cost the government about $500 million a year. The government has been phasing out the benefit with payouts which reduced the yearly bill for 2013-14 to $151 million.

Treasury Board is also asking Parliament to approve $50 million to cover the cost of improved health-care benefits and $196 million to cover a shortfall in the military's disability insurance plan.

Parliamentary Budget Office sounds warning over billions in federal lending

Kathryn May, Ottawa Citizen, March 2, 2015

Canada's budget watchdog is studying the "prodigious" growth of federal lending through Crown corporations and other agencies, now totalling more than $200 billion, with little scrutiny from public servants or Parliament.

The Parliamentary Budget Office recently flagged the magnitude and growth of these loans or "non-budgetary spending" over the past six years and now plans to examine the issue in an upcoming report, said assistant parliamentary budget officer Mostafa Askari.

For the PBO, the big issue is transparency and due process in managing these transactions, particularly whether MPs and Senators are fully aware of the magnitude of such funding.

Parliament votes on "non-budgetary" expenditures, but they don't get the same rigorous examination of other spending that Parliament reviews every year. These expenditures are approved by Parliament, but they don't expire at the end of the year like spending on programs and services delivered by departments.

This means MPs can approve the money in one year and never have to review the transactions again as part of their regular scrutiny unless the government wants to increase the ceiling on those loans. The loans also don't have an impact on the deficit or surplus like other spending — unless the government faces loans losses that force writing then down.

PBO officials say these non-budgetary expenditures are primarily in the form of loans — from the Canada Student Loans program to loans through Crown corporations to people or businesses. The big four Crown corporations are Canada Mortgage and Housing Corporation, Export Development Canada, Farm Credit Corporation and the Business Development Bank of Canada.

Other examples include loans to First Nations and advances to international organizations such as the International Monetary Fund.

The government has historically always had loans, but the portfolio was small, especially compared with overall budgetary spending. But they have grown significantly as the government has cut jobs and programs in the public service. In fact, the size of the loan portfolio, at about $211 billion, is getting close to the $250 billion that government spends every year.

A recent PBO report on the latest supplementary estimates show loans accounted for about $40 billion in 2002-03 compared with the $161 billion that year in funding approved by Parliament. By 2013-14, that amount had risen to $211 billon, compared with the $239 billion in regular spending.

These loans peaked at more than $306 billion in 2008-09 after the 2008 global financial crisis when governments were shoring up the economy with loans and direct intervention in the market such as the Conservatives' stimulus spending.

Askari said the amount of loans has decreased since then, including by $9.7 billion this year, but they haven't declined as significantly as expected, raising questions whether they are becoming "a standard kind of operating procedure."

Some worry these transactions have become another way to bypass Parliament.

Sahir Khan, the former assistant PBO and now a visiting fellow with the Jean-Luc Pépin Research Chair at the University of Ottawa, said the lack of scrutiny over these expenditures is similar to tax expenditures, such as the Children's Fitness Tax Credit, because "approved once, reviewed never."

Khan said tax expenditures estimated to be worth more than $100 billion a year also "work outside the conventional control gates" of public servants, Treasury Board and Parliament.

"Tax expenditures are also spending by another name yet are not subject to the normal control gates of direct program expenditures," said Khan. "They don't get scrutiny through the parliamentary appropriations process. One could speculate that the non-budgetary mechanisms are yet another way of spending money while avoiding regular non-partisan review by public servants and scrutiny by Parliament."

The PBO has been a strong advocate to overhaul the Estimates, the government's main spending plan, to help make government spending more open and transparent.

Under the constitution, MPs are responsible for overseeing public spending, but the big complaint is that the process has become perfunctory, with more than $250 billion the government spends every year approved with little scrutiny. Non-budgetary spending, such as loans, get even less scrutiny.

Khan said the handling of tax and loan expenditures exposes a "rather large gap in the system." They not only escape annual budgetary approval by Parliament, but there is no mechanism for review, such as the five-year review required under the Financial Administration Act for all grant and contributions programs.

But Khan said he is also concerned about the "acceptance of risk." He said the government sets aside money for potential loan losses, but the government has a lot of discretion on how much risk it recognizes which, if understated, could have a significant budgetary impact down the road.

Former finance minister Jim Flaherty raised concerns in 2013 about the size of government insurance on mortgages through CMHC, fearing that taxpayers could be saddled with a growing liability if the housing market crashed.

"Overall, the non-budgetary allocations provide a way to spend money without actually recognizing the full cost that relates to the potential risk of the loan not being repaid. If there are potential budgetary impacts, these may not be recognized until future years," said Khan.

The Conservatives' financial management strategy to wipe out the deficit has been aimed at cutting jobs and government spending. Loans, advances and similar investments allow the government to have a hand in the economy without directly intervening with new programs.

LA PRESSE .CA
VIDÉOS PHOTOS DÉBATS
ACTUALITÉS INTERNATIONAL AFFAIRES SPORTS AUTO ARTS

La réforme électorale des conservateurs contestée

La Presse, Presse Canadienne, le 23 février 2015

Deux organismes contestent devant les tribunaux la constitutionnalité d'amendements apportés par le gouvernement conservateur à la Loi électorale, qui auront pour conséquence, selon eux, de restreindre le droit de vote de milliers de Canadiens lors du prochain scrutin, prévu le 19 octobre.

Le Conseil des Canadiens et la Fédération canadienne des étudiantes et étudiants ont déposé leurs arguments écrits en vue de leur contestation judiciaire de certaines dispositions de la réforme électorale adoptée en 2014, appelée par les conservateurs la «Loi sur l'intégrité des élections».

L'avocat des deux groupes, Steven Shrybman, a estimé lundi, en conférence de presse à Ottawa, que c'est la légitimité même du gouvernement qui est en cause si ces amendements demeurent en vigueur.

Selon les deux groupes, les nouvelles dispositions relatives à l'identification de l'électeur contreviennent à l'article 3 de la Charte canadienne des droits et libertés, qui garantit le droit de vote pour tous, et portent atteinte au principe d'équité inscrit dans la Constitution.

Le cabinet du ministre responsable de la Réforme démocratique, Pierre Poilievre, n'a pas commenté la contestation judiciaire, lundi.

Le projet de «loi sur l'intégrité des élections» avait été déposé au printemps dernier et avait aussitôt suscité de sévères critiques d'experts d'horizons divers, ici et à l'étranger. Les conservateurs avaient finalement amendé leur projet de loi pour en retirer les articles les plus controversés, et l'avaient ensuite fait adopter à toute vapeur par les Communes et le Sénat.

Mais le gouvernement conservateur a entre autres retenu l'amendement qui ne permet plus d'aller voter avec comme seule preuve de résidence son carton de l'électeur, posté à la maison - comme l'ont fait quelque 400 000 Canadiens lors du scrutin de 2011. La nouvelle loi élimine aussi le recours au mécanisme du «répondant» pour les électeurs qui n'auraient pas sur eux une pièce d'identité appropriée. En 2011, 120 000 autres Canadiens avaient ainsi pu exercer leur droit de vote.

Jessica McCormick, de la Fédération canadienne des étudiantes et étudiants (FCÉÉ), estime que des milliers d'étudiants de niveau post-secondaire qui souhaitent exercer leur droit de vote pour la première fois cet automne seront refoulés au bureau de scrutin à

cause de la nouvelle disposition qui exige une carte d'identité comportant une adresse de résidence dans la circonscription.

Comme le scrutin - à date fixe - doit avoir lieu le 19 octobre prochain, le temps presse pour la contestation judiciaire de la réforme électorale. Aucune date n'a encore été fixée pour l'audition de la cause, a indiqué Me Shrybman, lundi.

Si jamais la cause sur le fond n'était pas entendue avant la tenue du scrutin, le Conseil des Canadiens et la FCÉÉ demandent au tribunal d'émettre une injonction qui suspendrait l'application des nouveaux articles contestés.

L'avocat a rappelé que les conservateurs avaient formé un gouvernement majoritaire en 2011 grâce à un peu moins de 10 000 voix réparties dans 16 circonscriptions où la lutte a été chaude. «N'oubliez pas que quelques centaines de voix, quelques dizaines - à plus forte raison quelques milliers de voix - peuvent sceller l'issue d'une élection dans n'importe quelle circonscription», a plaidé Me Shrybman.

---

thestar.com

Court challenge launched against Conservatives' election law overhaul

Toronto Star, Canadian Press, February 23, 2015

Two advocacy groups are asking the courts to set aside new Conservative election rules that will make it more difficult for thousands of Canadians to vote in this year's federal election.

The Council of Canadians and the Canadian Federation of Students have filed evidence to support a constitutional challenge of the 2014 reforms, dubbed the Fair Elections Act by the Harper government.

They say new voter identification rules contravene Section 3 of the charter, which states everyone has the right to vote, as well as the equality provisions in the Constitution.

The groups want a court to grant an injunction setting aside new proof-of-residency identification rules for voters, as well as measures in the new elections law that restrict the ability of the chief electoral officer to inform people about their right to vote.

Lawyer Steven Shrybman, who represents the advocacy groups, says the voter-restriction measures alone are enough to throw into question the legitimacy of the next federal election, which is scheduled for mid-October.

The Fair Elections Act was introduced last spring to near universal condemnation from electoral experts from across Canada and abroad, and the Conservatives eventually removed a number of the most contentious aspects of the bill before rushing it through the House of Commons and the Senate.

LeDroit

Service de courriels: «des retards inacceptables»

Paul Gaboury, Le Droit, le 26 février 2015

Services partagés Canada (SPC) confirme des retards « inacceptables » dans la mise en oeuvre de l'initiative visant le regroupement des 63 systèmes de courriels répartis dans 43 ministères et organismes fédéraux. D'abord prévu pour la « fin de l'exercice 2014-2015 », l'échéancier est maintenant repoussé d'un an.

Par ailleurs, SPC a confirmé que les deux entreprises retenues pour cette initiative, Bell et CGI, n'ont pu respecter les délais prévus. Des pénalités - pouvant totaliser jusqu'à 15 000 $ par jour de retard - sont prévues au contrat signé pour la réalisation de cette initiative.

Des retards avaient déjà obligé le ministère à repousser l'échéancier de sa mise en oeuvre à au moins deux reprises, d'abord de six, puis de huit et maintenant d'environ douze mois. « Bell et CGI n'ont pu respecter les délais prévus pour la mise en oeuvre de l'Initiative de transformation des services de courriel. Service partagés Canada est déçu des retards encourus et les trouvent inacceptables, mais le ministère continue de collaborer avec Bell et CGI pour tout mettre en oeuvre le plus rapidement possible », a indiqué la porte-parole du ministère, Marie-Hélène Rouillard.

Malgré les retards, Service partagés Canada soutient qu'il n'y a aucune incidence sur les employés et les services puisque « les employés continueront d'utiliser l'ancien système jusqu'au moment de la migration de leur compte vers votre.courriel@canada.ca ».

Quant à un possible impact budgétaire, le ministère soutient que « le regroupement permettra au gouvernement de réaliser des économies annuelles de 50 millions $ au 1er avril 2015 ».

LeDroit

Service de courriels: les retards étaient évitables, dénonce l'IPFPC

PAUL GABOURY, Le Droit, le 28 février 2015

Les retards «inacceptables» dans le projet de regroupement des systèmes de courriels des ministères fédéraux auraient pu être évités si les employés qui avaient «l'expérience et les connaissances» n'avaient pas été écartés du processus à la faveur de sous-traitants, soutient Debi Daviau, présidente de l'Institut professionnel de la fonction publique du Canada (IPFPC).

Services partagés Canada a admis, plus tôt cette semaine, que l'initiative visant à regrouper les 63 systèmes de 43 ministères fédéraux accuse maintenant une année de retard, Bell et CGI n'ayant pu respecter les délais prévus initialement.

Dès le début de cette initiative, l'IPFPC avait plaidé que la décision de confier un tel contrat de 400 millions $ au secteur privé était «un gaspillage de temps et d'argent». Le syndicat, dont l'effectif est de 55000 membres, compte environ 2000 employés travaillant aux divers systèmes de courriels du gouvernement.

«Nous sommes d'accord avec la modernisation et le regroupement des systèmes de courriels, souligne la présidente Daviau. Mais ce que nous trouvons stupide, c'est que nos membres qui étaient là dans le passé avec l'expérience des systèmes de courriels n'ont pas été consultés.»

À la demande du syndicat, la Commission de la fonction publique a accepté de mener un audit sur la sous-traitance à Services partagés Canada. «Il y a eu un abus de sous-traitance à Services partagés Canada et nous voulions que la CPF regarde la situation de plus près» a indiqué Mme Daviau, qui attend toujours les résultats de cet audit.

NATIONAL POST

Digital Acce

• FINANCIAL POST • NEWS • COMMENT • PERSONAL FINANCE • INVESTING • TECH • SPORTS • ARTS • LIFE • HOMES • DRIVING • CLASSIFIEDS • SUBSCRIBE

CANADA • WORLD • TORONTO • GRAPHICS • VIDEO • HOCKEY • HEALTH • APPETIZER • BOOKS • HOROSCOPES • NP TODAY • CONTESTS • POST POINTS

Open letter to Parliament: Amend C-51 or kill it

National Post, February 27, 2015

The following is an open letter addressed to all members of Parliament and signed by more than 100 Canadian professors of law and related disciplines.

Dear Members of Parliament,

Please accept this collective open letter as an expression of the signatories' deep concern that Bill C-51 (which the government is calling the Anti-terrorism Act, 2015) is a dangerous piece of legislation in terms of its potential impacts on the rule of law, on constitutionally and internationally protected rights, and on the health of Canada's democracy.

Beyond that, we note with concern that knowledgeable analysts have made cogent arguments not only that Bill C-51 may turn out to be ineffective in countering terrorism by virtue of what is omitted from the bill, but also that Bill C-51 could actually be counter-productive in that it could easily get in the way of effective policing, intelligence-gathering and prosecutorial activity. In this respect, we wish it to be clear that we are neither "extremists" (as the Prime Minister has recently labelled the Official Opposition for its resistance to Bill C-51) nor dismissive of the real threats to Canadians' security that government and Parliament have a duty to protect. Rather, we believe that terrorism must be countered in ways that are fully consistent with core values (that include liberty, non-discrimination, and the rule of law), that are evidence-based, and that are likely to be effective.

The scope and implications of Bill C-51 are so extensive that it cannot be, and is not, the purpose of this letter to itemize every problem with the bill. Rather, the discussion below is an effort to reflect a basic consensus over some (and only some) of the leading concerns, all the while noting that any given signatory's degree of concern may vary item by item. Also, the absence of a given matter from this letter is not meant to suggest it is not also a concern.

We are grateful for the service to informed public debate and public education provided, since Bill C-51 was tabled, by two highly respected law professors — Craig Forcese of the University of Ottawa and Kent Roach of the University of Toronto — who, combined, have great expertise in national security law at the intersection of constitutional law, criminal law, international law and other sub-disciplines. What follows — and we limit ourselves to five points — owes much to the background papers they have penned, as well as to insights from editorials in the media and speeches in the House of Commons.

Accordingly, we urge all MPs to vote against Bill C-51 for the following reasons:

Bill C-51 enacts a new security-intelligence information-sharing statute of vast scope with no enhanced protections for privacy and from abuse. The law defines "activities that undermine the security of Canada" in such an exceptionally broad way that "terrorism" is simply one example of nine examples, and only "lawful advocacy, protest, dissent and artistic expression" is excluded. Apart from all the civil-disobedience activities and illegal protests or strikes that will be covered (e.g. in relation to "interference with critical

infrastructure"), this deep and broad intrusion into privacy is made worse by the fact there are no corresponding oversight or review mechanisms adequate to this expansion of the state's new levels of information awareness. Concerns have already been expressed by the Privacy Commissioner, an Officer of Parliament, who has insufficient powers and resources to even begin to oversee, let alone correct abuses within, this expanded information-sharing system. And there is virtually nothing in the bill that recognizes any lessons learned from what can happen when information-sharing ends up in the wrong hands, as when the RCMP supplied poor information to US authorities that in turn led to the rendition of Maher Arar to Syria and his subsequent torture based on that – and further – information coming from Canada.

Bill C-51 enacts a new "terrorism" offence that makes it criminal to advocate or encourage "terrorism offences in general" where one does this being reckless as to whether the communication "may" contribute to someone else deciding to commit another terrorism offence. It is overbroad, unnecessary in view of current criminal law, and potentially counter-productive. Keep in mind how numerous and broad are the existing terrorism offences in the Criminal Code, some of which go beyond what the ordinary citizen imagines when they think of terrorism and all of which already include the general criminal-law prohibitions on counselling, aiding and abetting, conspiring, and so on: advocacy or encouragement of any of these "in general" could attract prosecution under the new C-51 offence. Note as well that gestures and physical symbols appear to be caught, and not just verbal or written exhortations. In media commentary and reports, there have been many examples of what could be caught, including in some contexts advocacy of armed revolution and rebellion in other countries (e.g. if C-51 had been the law when thousands of Canadians advocated support for Nelson Mandela's African National Congress in its efforts to overthrow apartheid by force of arms, when that was still part of the ANC's strategy). So, the chill for freedom of speech is real. In addition, in a context in which direct incitement to terrorist acts (versus of "terrorism offences in general") is already a crime in Canada, this vague and sweeping extension of the criminal law seems unjustified in terms of necessity – and indeed, the Prime Minister during Question Period has been unable or unwilling to give examples of what conduct he would want to see criminalized now that is not already prohibited by the Criminal Code. But, perhaps most worrying is how counter-productive this new crime could be. De-radicalization outreach programs could be negatively affected. Much anti-radicalization work depends on frank engagement of authorities like the RCMP, alongside communities and parents, with youth who hold extreme views, including some views that, if expressed (including in private), would contravene this new prohibition. Such outreach may require "extreme dialogue" in order to work through the misconceptions, anger, hatred and other emotions that lead to radicalization. If C-51 is enacted, these efforts could find themselves stymied as local communities and parents receive advice that, if youth participating in these efforts say what they think, they could be charged with a crime. As a result, the RCMP may cease to be invited in at all, or, if they are, engagement will be fettered by restraint that defeats the underlying methods of the programme. And the counter-productive impact could go further. The Prime Minister himself confirmed he would want the new law used against young people sitting in front of computers in their family basements, youth who can express extreme views on social-media platforms. Why is criminalization counter-productive here? As a National Post editorial pointed out, the result of Bill C-51 could easily be that one of the best sources of intelligence for possible future threats — public social-media platforms — could dry up; that is, extreme views

will go silent because of fears of being charged. This undercuts the usefulness of these platforms for monitoring and intelligence that lead to knowing not only who warrants further investigative attention but also whether early intervention in the form of de-radicalization outreach efforts are called for.

Bill C-51 would allow CSIS to move from its central current function — information-gathering and associated surveillance with respect to a broad area of "national security" matters — to being a totally different kind of agency that now may actively intervene to disrupt activities by a potentially infinite range of unspecified measures, as long as a given measure falls shy of causing bodily harm, infringements on sexual integrity or obstructions of justice. CSIS agents can do this activity both inside and outside Canada, and they can call on any entity or person to assist them. There are a number of reasons to be apprehensive about this change of role. One only has to recall that the CSIS Act defines "threats to the security of Canada" so broadly that CSIS already considers various environmental and Aboriginal movements to be subject to their scrutiny; that is to say, this new disruption power goes well beyond anything that has any connection at all to "terrorism" precisely because CSIS's mandate in the CSIS Act goes far beyond a concern only with terrorism. However, those general concerns expressed, we will now limit ourselves to the following serious problem: how Bill C-51 seems to display a complete misunderstanding of the role of judges in our legal system and constitutional order. Under C-51, judges may now be asked to give warrants to allow for disruption measures that contravene Canadian law or the Charter, a role that goes well beyond the current contexts in which judges now give warrants (e.g. surveillance warrants and search and seizure warrants) where a judge's role is to ensure that these investigative measures are "reasonable" so as not to infringe section 8 of the Canadian Charter of Rights. What C-51 now does is turn judges into agents of the executive branch (here, CSIS) to pre-authorize violations of Canadian law and, even, to pre-authorize infringements of almost any Charter right as long as the limits in C-51 – bodily harm, sexual integrity and obstruction of justice – are respected. This completely subverts the normal role of judges, which is to assess whether measures prescribed by law or taken in accordance with discretion granted by statute infringed rights — and, if they did, whether the Charter has been violated because the infringement cannot be justified under the Charter's section 1 limitation clause. Now, a judge can be asked (indeed, required) to say yes in advance to measures that could range from wiping a target's computer clear of all information to fabricating materials (or playing agent-provocateur roles) that discredit a target in ways that cause others no longer to trust him, her or it: and these examples are possibly at the mild end of what CSIS may well judge as useful "disruption" measures to employ. It is also crucial to note that CSIS is authorized to engage in any measures it chooses if it concludes that the measure would not be "contrary" to any Canadian law or would not "contravene" the Charter. Thus, it is CSIS that decides whether to even go to a judge. There is reason to be worried about how unregulated (even by courts) this new CSIS disruption power would be, given the evidence that CSIS has in the past hidden information from its review body, SIRC, and given that a civil-servant whistleblower has revealed that, in a parallel context, Ministers of Justice in the Harper government have directed Department of Justice lawyers to conclude that the Minister can certify under the Department of Justice Act that a law is in compliance with the Charter if there is a mere 5% chance a court would uphold the law if it was challenged in court. Finally, it is crucial to add that these warrant proceedings will take place in secret, with only the government side represented, and no prospect of appeal. Warrants will not be disclosed to the target and, unlike police

investigations, CSIS activities do not culminate in court proceedings where state conduct is then reviewed.

We now draw attention to effectiveness by noting a key omission from C-51. As the Official Opposition noted in its "reasoned amendment" when it moved that C-51 not be given Second Reading, Bill C-51 does not include "the type of concrete, effective measures that have been proven to work, such as working with communities on measures to counter radicalization of youth – may even undermine outreach." This speaks for itself, and we will not elaborate beyond saying that, within a common commitment to countering terrorism, effective measures of the sort referenced in the reasoned amendment not only are necessary but also must be vigorously pursued and well-funded. The government made no parallel announcements alongside Bill C-51 that would suggest that these sort of measures are anywhere near the priority they need to be.

Finally, the defects noted in points 1, 2 and 3 (information-sharing, criminalizing expression, and disruption) are magnified by the overarching lack of anything approaching adequate oversight and review functions, at the same time as existing accountability mechanisms have been weakened and in some cases eliminated in recent years. Quite simply, Bill C-51 continues the government's resolute refusal to respond to 10 years of calls for adequate and integrated review of intelligence and related security-state activities, which was first (and perhaps best) articulated by Justice O'Connor in a dedicated volume in his report on what had happened to Maher Arar. Only last week, former prime ministers and premiers wrote an open letter saying that a bill like C-51 cannot be enacted absent the kind of accountability processes and mechanisms that will catch and hopefully prevent abuses of the wide new powers CSIS and a large number of partner agencies will now have (note that CSIS can enlist other agencies and any person in its disruption activities and the information-sharing law concerns over a dozen other government agencies besides CSIS). Even if one judged all the new CSIS powers in C-51 to be justified, they must not be enacted without proper accountability. Here, we must note that the government's record has gone in the opposite direction from enhanced accountability. Taking CSIS alone, the present government weakened CSIS's accountability by getting rid of an oversight actor, the Inspector General, whose job was to keep the Minister of Public Security on top of CSIS activity in real time. It transferred this function to CSIS's review body, the Security Intelligence Review Committee (SIRC), which does not have anything close to the personnel or resources to carry this function out – given it does not have sufficient staff and resources to carry out its existing mandate to ensure CSIS acts within the law. Beyond staff, we note that SIRC is a body that has for some time not been at a full complement of members, even as the government continues to make no apology for having once appointed as SIRC's Chair someone with no qualifications (and it turns out, no character) to be on SIRC let alone to be its chair (Arthur Porter). And, as revealed in a recent CBC investigation, the government has simply not been straight with Canadians when it constantly says SIRC is a robust and well-resourced body: its budget is a mere $3 million, which has flat-lined since 2005 when the budget was $2.9 million, even as its staff has been cut from 20 in 2005 to 17 now. Without an integrated security-intelligence review mechanism, which should also include some form of Parliamentary oversight and/or review, and with especially SIRC (with jurisdiction only over CSIS) not a fully effective body, we are of the view that no MP should in good conscience be voting for Bill C-51.

Above, we have limited ourselves to five central concerns, but it is important to reiterate that some or all of the signatories have serious concerns about a good number of other aspects of C-51 – and/or about detailed aspects of some of the concerns that were generally expressed in the above five points. The following are some (but only some) of those concerns, in point form. They are included by way of saying that signatories believe these all need to be looked at closely and rigorously during House of Commons committee study of C-51, now that it has passed Second Reading:

C-51 radically lowers the threshold for preventive detention and imposition of recognizance with conditions on individuals. Only three years ago, Parliament enacted a law saying this detention/conditions regime can operate if there is a reasonable basis for believing a person "will" commit a terrorist offence. Now, that threshold has been lowered to "may." There has been a failure of the government to explain why exactly the existing power has not been adequate. In light of the huge potential for abuse of such a low threshold, including through wide-scale use (recalling the mass arrests at the time of the War Measures Act in Quebec), Canadians and parliamentarians need to know why extraordinary new powers are needed, especially when the current ones were enacted in the context of ongoing threats by Al-Qaeda to carry out attacks in Canada that seem no less serious than the ones currently being threatened by entities like ISIS and Al-Shabab.

C-51 expands the no-fly list regime. It seems to have simply replicated the US no-fly list rules, the operation of which has been widely criticized in terms of its breadth and impacts on innocent people. Is this the right regime for Canada?

C-51's new disruption warrants now allows CSIS to impinge on the RCMP's law enforcement role, bringing back turf wars that were eliminated when intelligence and law enforcement were separated in the wake of the RCMP's abusive disruption activities of the late 1960s and early 1970s. But, even more important than turf wars is the potential for CSIS behaviour in the form of disruptive measures to undermine both the investigation and the prosecution of criminal cases by interfering with evidentiary trail, contaminating evidence, and so on.

C-51, in tandem with C-44, permits CSIS to engage not just in surveillance and information-gathering abroad, but also in disruption. There are many questions about how this will work. The danger of lawlessness seems to be significantly greater for CSIS activities abroad, in that CSIS only needs to seek approval for disruption under C-51 where Canadian, not foreign, law could be breached or where the Charter could be contravened (with Canadian law on the application of the Charter outside Canada being quite unclear at the moment). And there is no duty for CSIS to coordinate with or seek approval from the Department of Foreign Affairs, such that the chances of interference with the conduct of Canada's foreign affairs cannot be discounted. Nor can we ignore the likely tendency for disruption measures abroad to be more threatening to individuals' rights than in Canada: for example, Parliament needs to know whether CSIS agents abroad can engage in detention and rendition to agencies of other countries under the new C-51 regime.

We end by observing that this letter is dated Feb. 23, 2015, which is also the day when the government has chosen to cut off Second Reading debate on Bill C-51 after having allocated a mere three days (in reality, only portions of each of those days) to debate. In

light of the sweeping scope and great importance of this bill, we believe that circumventing the ability of MPs to dissect the bill, and their responsibility to convey their concerns to Canadians at large before a Second Reading vote, is a troubling undermining of our Parliamentary democracy's capacity to hold majority governments accountable. It is sadly ironic that democratic debate is being curtailed on a bill that vastly expands the scope of covert state activity when that activity will be subject to poor or even non-existent democratic oversight or review.

In conclusion, we urge all Parliamentarians to ensure that C-51 not be enacted in anything resembling its present form.

Yours sincerely,

- Jennie Abell, Associate Professor, Faculty of Law – Common Law, University of Ottawa
- Amir Attaran, Associate Professor, Faculty of Law – Common Law , University of Ottawa
- Natasha Bakht, Associate Professor, Faculty of Law – Common Law, University of Ottawa
- Clayton Bangsund, Assistant Professor, College of Law, University of Saskatchewan
- Margaret Beare, Professor of Law and Sociology, York University
- Faisal Bhabha, Assistant Professor, Osgoode Hall Law School, York University
- Jennifer Bond, Assistant Professor, Faculty of Law – Common Law, University of Ottawa
- Suzanne Bouclin, Assistant Professor, Faculty of Law – Civil Law, University of Ottawa
- Susan Boyd, Professor, Peter A. Allard School of Law, University of British Columbia
- Sarah Buhler, Assistant Professor, College of Law, University of Saskatchewan
- Karen Busby, Professor, Faculty of Law, University of Manitoba, and Director, Centre for Human Rights Research
- Michael Byers, Professor and Canada Research Chair, Global Politics and International Law, University of British Columbia
- Angela Cameron, Associate Professor, Faculty of Law – Common Law, University of Ottawa
- Pascale Chapdelaine, Professor, Faculty of Law, University of Windsor
- Larry Chartrand, Professor, Faculty of Law – Common Law, University of Ottawa
- Allison Christians, H. Heward Stikeman Chair in Tax Law, Faculty of Law, McGill University
- Brenda Cossman, Professor, Faculty of Law, University of Toronto
- Stephen Coughlan, Professor, Schulich School of Law, Dalhousie University
- François Crépeau, Hans & Tamar Openheimer Professor in Public International Law, Faculty of Law, McGill University
- Hugo Cyr, Professor of Law, University of Quebec in Montreal
- Jennifer E. Dalton, Assistant Professor, School of Public Policy and Administration, York University

- Maneesha Deckha, Associate Professor, Faculty of Law, University of Victoria
- Julie Desrosiers, Professor, Faculty of Law, University Laval
- Peter Dietsch, Associate Professor, Department of Philosophy, University of Montreal
- Stacy Douglas, Assistant Professor, Department of Law & Legal Studies, Carleton University
- Susan Drummond, Associate Professor of Law, Osgoode Hall Law School, York University
- Isabelle Duplessis, Professor, Faculty of Law, University of Montreal
- Stuart Farson, Adjunct Professor, Political Science, Simon Fraser University
- Gerry Ferguson, Distinguished Professor, Faculty of Law, University of Victoria
- Leonard, Findlay, Professor, College of Arts and Science, University of Saskatchewan, and Director, Humanities Research Unit
- Colleen Flood, Professor, Faculty of Law, University of Ottawa; Research Chair in Health Law & Policy
- Fabien Gélinas, Professor, Faculty of Law, McGill University
- Daphne Gilbert, Associate Professor, Faculty of Law – Common Law, University of Ottawa
- Jassmine Girgis, Associate Professor, Faculty of Law, University of Calgary
- Isabel Grant, Professor, Peter A. Allard School of Law, University of British Columbia
- Marie Annik Grégoire, Associate Professor, Faculty of Law, University of Montreal
- Sakej Henderson, Professor, University of Saskatchewan, Research Director, Native Law Centre of Canada
- Gleider I. Hernández, Senior Lecturer in Public International Law, Durham Law School
- Steve Hewitt, Senior Lecturer, Department of History, University of Birmingham
- Louis-Philippe Hodgson, Associate Professor, Department of Philosophy, York University
- Felix Hoehn, Assistant Professor, College of Law, University of Saskatchewan
- Jula Hughes, Associate Professor, Faculty of Law, University of New Brunswick
- Allan Hutchinson, Distinguished Research Professor of Law, Osgoode Hall Law School, York University
- Shin Imai, Associate Professor of Law, Osgoode Hall Law School, York University
- Martha Jackman, Professor, Faculty of Law, University of Ottawa
- Juliet Johnson, Associate Professor, Political Science, McGill University
- Rebecca Johnson, Professor, Faculty of Law, University of Victoria
- Jasminka Kalajdzic, Associate Professor, Faculty of Law, University of Windsor
- Charis Kamphuis, Assistant Professor, Faculty of Law, Thompson Rivers University
- John Keyes, Adjunct Professor, Faculty of Law, University of Ottawa
- Muharem Kianieff, Associate Professor, Faculty of Law, University of Windsor
- Jeff King, Senior Lecturer, Faculty of Laws, University College London
- Jennifer Koshan, Professor, Faculty of Law, University of Calgary

- François J. Larocque, Associate Professor, Faculty of Law – Common Law, University of Ottawa
- Fannie Lafontaine, Associate Professor, Canada Research Chair on International Criminal Justice and Human Rights, University Laval
- Louis-Philippe Lampron, Professor, Faculty of Law, Laval University
- Nicole LaViolette, Professor, Faculty of Law – Common Law, University of Ottawa
- Jean Leclair, Professor, Faculty of Law, University of Montreal
- Ed Levy, Retired Professor of Philosophy, University of British Columbia
- Brian Lewis, Professor of History, McGill University
- Jamie Liew, Assistant Professor, Faculty of Law – Common Law, University of Ottawa
- Catherine Lu, Associate Professor, Political Science, McGill University
- Audrey Macklin, Professor of Law and Chair in Human Rights Law, Faculty of Law, University of Toronto
- Alice MacLachlan, Associate Professor, Philosophy, York University
- Warren Magnusson, Professor, Department of Political Science, University of Victoria
- Kathleen Mahoney, Professor of Law, University of Calgary; Fellow of the Royal Society of Canada
- Marie Manikis, Assistant Professor, Faculty of Law, McGill University
- John Manwaring, Professor, Faculty of Law – Common Law, University of Ottawa
- Michael Marin, Assistant Professor, Faculty of Law – Common Law, University of Ottawa
- Graham Mayeda, Associate Professor, Faculty of Law – Common Law, University of Ottawa
- Sheila McIntyre, Professor Emerita, Faculty of Law – Common Law, University of Ottawa
- Michael M'Gonigle, Professor, Faculty of Law, University of Victoria
- Cynthia Milton, Associate Professor, Department of History, University of Montreal
- Richard Moon, Professor, Faculty of Law, University of Windsor
- Mary Jane Mossman, Professor of Law, Osgoode Hall Law School, York University
- Claire Mummé, Assistant Professor, Faculty of Law, University of Windsor
- Roxanne Mykitiuk, Associate Professor of Law, Osgoode Hall Law School, York University
- Pierre Noreau, Professor, Faculty of Law, University of Montreal
- Darren O'Toole, Professor, Faculty of Law, University of Ottawa
- Charles-Maxime Panaccio, Associate Professor, Faculty of Law, University of Ottawa
- Steven Penney, Professor, Faculty of Law, University of Alberta
- Denise Reaume, Professor, Faculty of Law, University of Toronto
- Philip Resnick, Professor Emeritus, Political Science, University of British Columbia
- Darryl Robinson, Associate Professor, Faculty of Law, Queen's University

- David Robitaille, Professor of Constitutional Law, University of Ottawa and trustee at the Quebec Centre for Environmental Law
- Sanda Rodgers, Professor Emerita, Faculty of Law, University of Ottawa
- Bruce Ryder, Associate Professor of Law, Osgoode Hall Law School, York University, and Academic Director, Anti-Discrimination Intensive Program
- Hengameh Saberi, Assistant Professor of Law, Osgoode Hall Law School, York University
- Calvin Sandborn, Professor, Faculty of Law, University of Victoria, Legal Director, UVic Environmental Law Centre
- Steven Savit, Professor, Department of Philosophy, University of British Columbia
- Jennifer Schulz, Associate Professor, Faculty of Law, University of Manitoba
- Dayna Scott. Associate Professor of Law, Osgoode Hall Law School, York University, and Graduate Program Director
- Noel Semple, Assistant Professor, Faculty of Law, University of Windsor
- Martha Shaffer, Associate Professor, Faculty of Law, University of Toronto
- Elizabeth Sheehy, Professor, Faculty of Law – Common Law, University of Ottawa
- James Sheptycki, Professor of Criminology, Faculty of Liberal Arts and Professional Studies, York University
- James Stewart, Assistant Professor, Peter A. Allard School of Law, University of British Columbia
- Donald Stuart, Professor, Faculty of Law, Queen's University
- Marie-Eve Sylvestre, Associate Professor, Faculty of Law – Civil Law, University of Ottawa, and Vice-Dean, Research and Communications
- François Tanguay-Renaud, Associate Professor of Law, Osgoode Hall Law School, York University, and Director, Nathanson Centre on Transnational Human Rights, Crime and Security
- David Tanovich, Professor, Faculty of Law, University of Windsor
- Christine Tappolet, Professor, Department of Philosophy, University of Montreal
- Saul Templeton, Assistant Professor, Faculty of Law, University of Calgary
- Kimberley N. Trapp, Senior Lecturer in International Law, Faculty of Laws, University College London
- Gus Van Harten, Associate Professor of Law, Osgoode Hall Law School, York University
- Lucinda Vandervort, Professor, College of Law, University of Saskatchewan
- Wilfrid Waluchow, Professor, Senator William McMaster Chair in Constitutional Studies, Department of Philosophy, McMaster University
- Christopher Waters, Professor, Faculty of Law, University of Windsor
- Wesley Pue, Professor, Peter A. Allard School of Law, University of British Columbia
- Reg Whitaker, Distinguished Research Professor Emeritus, York University, and Adjunct Professor of Political Science, University of Victoria
- David Wiseman, Assistant Professor, Faculty of Law – Common Law, University of Ottawa
- Stepan Wood, Professor, Osgoode Hall Law School, York University

---

Anti-terror law fails to guarantee agencies will share information, ex-judge says

Sean Fine, The Globe and Mail, March 1, 2015

The former Supreme Court judge who headed an inquiry into Canada's worst terrorism incident says the federal government's new anti-terror legislation is flawed because it fails to ensure that CSIS and the RCMP share information on unfolding threats.

John Major says the crucial lack of co-operation between the two agencies that occurred before the 1985 Air India explosion is still a concern and that a security overseer is needed to ensure information-sharing takes place.

In his 2010 report into the disaster, he said a national security adviser with enhanced powers should be appointed to settle disputes and ensure intelligence is shared between the Canadian Security Intelligence Service, the RCMP and 14 other security agencies and departments. The Conservative government rejected that recommendation at the time.

"They may be entitled to do more than simple intelligence gathering," he said of CSIS under the proposed new law. "If that's the case, it can lead to other problems of overlap. The RCMP get a little annoyed and think, 'Well, let CSIS do it.' And CSIS doesn't do it. When you have that many agencies involved, it's a recipe for confusion unless there's somebody steering the ship."

A spokesman for Public Safety Minister Steven Blaney, however, said greater information-sharing is a pillar of the proposed law. "This Act fulfills the government's commitment to introduce information-sharing legislation as part of the Air India Inquiry Action Plan," Jean-Christophe de Le Rue said. But Mr. Major said he saw nothing in the bill that gives a national security adviser the authority necessary to ensure the information is actually shared.

His inquiry into the intelligence failures behind the Air India bombing that killed 329 people heard extensive testimony from CSIS and the RCMP before publishing its five-volume report in 2010.

Canada's biggest revamp of anti-terrorism laws since 9/11 is set to be debated this month by a Commons committee. Bill C-51 would, among other things, allow CSIS, a civilian spy agency, to disrupt threats to national security by obtaining a judge's warrant to cancel travel plans or interfere with bank accounts or electronic communications. More than 100 Canadian law professors signed an open letter on Friday calling the bill a danger to

democracy and the rule of law. Separately, a group of four former prime ministers and 14 others, including Mr. Major, signed a commentary in The Globe and Mail urging the creation of additional oversight for the country's security agencies.

Mr. Major called the law professors' letter "way over the top. You've got to come back to what we're dealing with – a serious problem of terrorism in Canada. You can't have a halfhearted war against that. You're going to have some abuses that creep up no matter how carefully the legislation is drawn. But you've got to arm our people with some authority to root out terrorists."

The biggest lesson of the Air India inquiry, he said, is that a lack of co-operation between CSIS, the Mounties and other intelligence-gathering departments is a fatal weakness in the country's security defences. CSIS gathers intelligence on threats to Canada; the RCMP conduct criminal investigations.

"It's obvious that had the RCMP known what CSIS knew, and vice versa, about the proposed attack on Air India, they would have stopped it," the 84-year-old Calgarian said from a winter vacation in Arizona. Former Progressive Conservative prime minister Brian Mulroney appointed him to the Supreme Court in 1992, and he served until 2005.

The problem of information-sharing remains, he said. It's human nature to want to complete what you start and, "for lack of a better word, get the credit or glory for achieving it." So CSIS "tends to hold on to the information rather than turn it over to the RCMP. Similarly, the RCMP is not without fault. The system just doesn't work if there isn't some way of ensuring that you have information-sharing. And there's no way from what I've seen that the present proposed legislation is going to do that."

Wesley Wark, a visiting professor at the University of Ottawa specializing in security issues, said Mr. Major's conception of a national security adviser wouldn't fit with how the Canadian government bureaucracy works. Richard Fadden is a national security adviser to the Prime Minister, but he can only assist in co-ordination, not dictate it, Prof. Wark said.

"It was felt that you couldn't have a national security adviser who was a super-deputy minister cutting across lines of authority," he said.

Mr. Major's report envisioned a national security adviser whose staff would be seconded from agencies with national security responsibilities, such as CSIS, the RCMP, the Canadian Border Services Agency and the foreign affairs department.

"Surely the obstacles described by Wark are not beyond human competence," Mr. Major said on Sunday. "We are talking about reorganization, not splitting the atom."

---

thestar.com

Opinion: Make the justice system accessible

‘The inability of so many Canadians to access our justice system because of financial and other barriers is a quiet crisis, yet the consequences are profound.’

By Lorne Sossin and David Allgood, Contribution to The Toronto Star, February 25, 2015

Lorne Sossin, Dean of Osgoode Hall Law School at York University, and David Allgood, General Counsel of RBC Royal Bank, are Ambassadors for Flip Your Wig for Justice. *The annual campaign to support organizations committed to improving access to justice culminates Thursday.*

The inability of so many Canadians to access our justice system because of financial and other barriers is a quiet crisis, yet the consequences are profound. We cannot see what is not in front of us, and we cannot hear voices unable to speak.

Canadians were horrified by the death of Zahra Abdille, the public health nurse killed last November in an instance of suspected domestic violence, along with her two children. That Abdille had applied for but failed to qualify for legal aid drove home a point many of us in the legal profession have been discussing in recent years: we need to ensure legal help is there, when needed, for those with nowhere else to turn.

The reality is, the legal system is costly, slow and complex. As lawyers, we would suggest there are some good reasons why litigation is so complicated, including reasons that speak to the importance of due process and procedural fairness in our system.

That said, you don’t need to be a lawyer to know that a legal right or protection — whether in family, immigration or employment or any other area of the law — is meaningless if those in need of the justice system cannot access it.

Despite a recent decision in Ontario to raise the eligibility thresholds for the first time in a generation, only those in the very lowest income brackets qualify for legal aid or the services of a legal clinic. With legal fees starting from upwards of $150 an hour, it is unfathomable that a single person making just over $19,080 could afford counsel, and yet this is the new cut-off for legal aid.

According to Statistics Canada, single parents, recent immigrants, people with disabilities, seniors and Aboriginal peoples are more likely than other groups to be poor.

So the access to justice crisis disproportionately impacts those who need our support the most.

And yet, as the gap between being eligible for aid and being able to afford a lawyer continues to grow, a staggering number of litigants — as many as 80 per cent in family court cases in Canada — are trying to represent themselves in a complex, intimidating system that was designed for lawyers, not laypeople.

This is not simply a matter of inconvenience or stress: reports show that whether or not one has a lawyer is a significant variable affecting an individual's chances for success in court. One study found that people who receive legal assistance are up to 1,380 per cent (no, that last zero is not a typo) more likely to have better results in court than those without representation.

Many of these self-represented individuals face additional hurdles to justice — challenges such as education, literacy, language, mental health, culture, geography — further impairing their likelihood of being able to achieve a just resolution to their legal problem on their own.

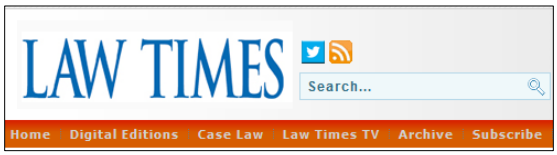
Several reports have shown that legal issues tend to have a cascading effect; in other words, they spiral and create other social problems. A recent study found that 71 per cent of respondents who experienced legal issues also experienced one of a series of related problems as a consequence, including stress-related mental illness, poor health, loss of employment or income, relationship breakdown, a permanent disability, a forced move, bankruptcy, a loss of custody, or a move to a shelter.

It is no surprise then to learn that a separate study also found that, at the close of their legal matter, self-represented litigants showed symptoms similar to Post Traumatic Stress Disorder.

There is something tragically dysfunctional about a system that is intended to help people, and yet instead — in many cases — creates additional problems for them, including serious mental health issues.

The commitment of pro bono organizations to provide legal assistance and information for those who need it helps to fill some of the gaps in the system. Yet because these organizations are also under-resourced, for far too many the price of justice is simply out of reach.

Access to justice is an issue that touches us all. As we have seen with the Zahra Abdille case, families, communities and our society as a whole are damaged when people fail to get the justice they need. Not every story is as horrific as that one, but every story matters.



Court rejects attempt to blame articling student for delay

By Yamri Taddese, Law Times, Februrary 23, 2015

Highlighting the relationship between lawyers and their articling students, a Superior Court master, in upholding an order dismissing a personal injury action as abandoned, has taken issue with a law firm that laid blame on a student with mental-health issues.

The student "was, after all, a student, and one who was not well, a fact known to his firm," wrote Superior Court Master Joan Haberman in Nadarajah v. Lad on Feb. 10.

"It is the firm that has carriage of the action and lack of activity by the firm, not simply the student, is the critical factor and where the court's focus must be."

Haberman found the personal injury case had been subject to delay from the outset and not just in the few months the student was at the firm. The student's involvement "amounts to a small part of what went wrong here and why," wrote Haberman in rejecting a motion to set aside the dismissal.

The articling student had substance abuse problems, the court heard, and after resigning from the firm in March 2012, he "sadly took his own life in July 2012."

According to Haberman, lawyer Paul Wilkins, who at the time was working at personal injury law firm SLS PC, said it was the firm's practice to have articling students keep track of cases to ensure the court didn't dismiss them for delay.

During cross-examination, Wilkins was asked what systems the firm had in place in terms of a diary or a ticker system to stay on top of dates. ". . . We gave it to the articling students, that was the system," he responded.

"There is no evidence that Wilkins had any system for keeping track of the Rule 48 deadlines," wrote Haberman.

"In fact, his evidence when cross-examined is clear: there was no system for keeping track of these deadlines."

The firm assigned the student, identified in the ruling only as AS, to deal with all incoming notices of dismissal and dismissal orders, according to Wilkins, who told the court the student was "largely unsupervised in this assignment."

Wilkins tells Law Times he'll appeal the master's decision. "I have no comment as this is a subject of an appeal," he says.

James Srebrolow, a partner at SLS PC, says it wasn't a firm-wide practice to have articling students keep track of limitation periods without supervision. "Effectively, we're blamed by Mr. Wilkins for what happened, saying this is how the firm practises. I'm saying no, this is how the firm for that file practised because Paul Wilkins was the member of the firm," he says, adding the firm still accepts responsibility for what happened in the case.

"[Wilkins] worked for the firm. We should have had more control in place vis-à-vis his practice. We didn't. We, collectively the firm, missed the boat on this one, no doubt about it."

If a lawyer or a firm is relying on a student's diary to keep track of court notices, "then they've got problems," says Gilbertson Davis LLP lawyer Lee Akazaki.

Akazaki also says the pressure of managing notices is a stressful and repetitive duty for students. "I would say that giving students the sole and unsupervised responsibility to deal with court notices and court deadlines is, apart from the practice-management problems, to immerse the students in an unduly stressful environment," he says.

"Broadly, this case can show you that if you provide your articling students with repetitive and excessively stressful work . . . it will lead to an unhealthy law firm environment," he adds.

Cassels Brock & Blackwell LLP associate Jeremy Martin, who mentors articling students, says it's an "exceptional practice" to rely on unsupervised students to keep track of court notices.

"I'd be very surprised if that was anything but an extreme rarity," says Martin.

"I think the vast majority of people understand that students are there to assist you with your work. They're not there to do your work for you."

While the ruling makes no suggestion of what caused the student's struggles, the case "flags the ongoing problems we're having with any kind recognition for accommodation of mental-health problems in this profession," he says.

"No matter where you're articling, the stakes are so high, especially in litigation but also any kind of legal work, and the expectation is that everything is going to be detail oriented and perfect.

"There's so much stress placed on students that if you are already suffering from substance abuse issues or if you have an anxiety disorder or anything like that, not only the expectation but the culture is also that you need to always say, 'Yes, I can handle more work.'"

According to Haberman's ruling, Wilkins said the firm had learned about the student's substance abuse problems in November 2011, a short time after he received the assignment.

"At that time at the urging of the Law Society [of Upper Canada], he [the student] entered a rehabilitation program," wrote Haberman.

"Wilkins does not discuss what became of AS's time sensitive work. There is no indication that he took it back or reassigned it in his affidavit."

What we're talking about when we talk about 'judicial activism'

Has the Supreme Court gone too far?

Emmett Macfarlane, Contribution to MacLean's, February 23, 2015

Emmett Macfarlane *is an assistant professor of political science at the University of Waterloo.*

In the wake of landmark decisions on assisted suicide and the right to strike (among others), there appears to be a new renaissance for decrying the "judicial activism" of the Supreme Court of Canada.

Andrew Coyne accuses the Court of ignoring precedent, rewriting the constitution and basically lacking "any rational basis" for its decisions. Conrad Black is equally critical. Stockwell Day accuses the Court of writing law, rather than merely applying existing law. Gordon Gibson arguably goes even farther, calling the Court "the greatest threat to our democracy," and accusing it of "making" rather than merely "interpreting" the law. And Brian Lee Crowley complains of the "unaccountable" and virtually unlimited control judges have over the meaning of the Charter, allowing them to trump legislation and introduce uncertainty into the law. In the view of all of these critics, it is asserted that judges have abandoned the "appropriate" level of judicial restraint.

Charges of judicial activism, however, are inherently tricky and sometimes incoherent. In a lot of public discourse, complaints about activist decisions are simply complaints from someone who disagrees with a particular outcome. When expressed as disagreement, using the concept of judicial activism isn't very helpful; one person's activism is another person's legitimate exercise of judicial authority to uphold the constitution.

Léonid Sirota, who writes an award-winning legal blog, drives this point home in a critical response to Coyne's column. Coyne's argument is more sophisticated than merely disagreeing with a decision; instead, it focuses on the Court's reasons, essentially defining judicial activism not as merely an "incorrect" decision but, an "unreasonable" one. Sirota ultimately finds even this frame unhelpful (or at least unconvincing, in relation to the cases that are the subject of Coyne's ire). Reasonable people can debate whether Coyne is right about the reasonableness of the Court's decisions. I think there are other problems with Coyne's argument, the most glaring of which is the assertion that the current Court is the most activist in Canada's history. He is almost definitely wrong on this point; while the Harper government has lost quite a few prominent constitutional cases, the Court has not been invalidating government decisions or laws with anywhere near the frequency of the late 1980s to mid-1990s.

But do these critiques of the judicial activism concept make the concept itself irrelevant? Can the Supreme Court be activist in any sense? Many lawyers and legal scholars seem to think the Court cannot be activist. In other posts, Sirota has argued that judicial activism is "near-meaningless" and non-existent. On Twitter, a few lawyers I engaged with argued that the Court can't be activist because whenever it invalidates a law, overturns a government decision or influences public policy it is merely performing its role (a role that the constitutional framers of 1982 expressly gave it, and which in other ways it has always had, as when it adjudicates federalism disputes).

This strikes me as completely wrong. For one thing, it is premised on a view that the constitution is only what the judges say it is. For some in the legal community, this apparently means the Court literally cannot err in its interpretation of the law. Other legal commentators have a slightly more nuanced view but one that basically amounts to the same thing: sure, judges can err, but as United States Supreme Court Justices Robert Jackson famously said: "We are not final because we are infallible, but we are infallible only because we are final."

This is a cute play on words but it is still fundamentally nonsense. Most importantly, it ignores the enormous amount of discretion Supreme Court justices have when interpreting the constitution. On many of the difficult cases that reach the Supreme Court, one set of nine judges will reach a completely different decision than another set of nine judges. For that matter, every time there's a dissenting judgment is proof that there is no obviously "correct" outcome required by the law.

At its most fundamental, there is a tendency among some in the legal community to view law as something that is completely autonomous from politics, morality and ideology. But in cases involving inherently political and moral issues like assisted suicide or complex public policies like labour relations or the health care system, judging itself has inherently political elements.

To be clear, I am not claiming that law is nothing but politics. I wrote an entire book arguing against the idea that judging is only politics in another form; I do not agree with those who simply label judges as "liberal" or "conservative" and believe that ideology is all that matters. The law, legal precedent, the constitutional text, and the institutional norms and processes within the Court all make a difference in shaping and constraining judicial decisions. But law and politics overlap. Judges' ideologies matter. And this is not

just about recognizing that judges are humans and therefore fallible, it is about recognizing that Charter cases are political and the Court itself is a political institution.

From this perspective, we have to recognize that the meaning of the constitution itself is independent, in an important sense, from what the Court says it is; the Court doesn't always get it right, and the other branches of government may have a legitimate interpretation of the constitution that diverges from it. We also have to recognize that judicial activism is real. And here is where political science comes in, because it provides a definition of judicial activism that has nothing to do with whether one likes or agrees with a given judicial decision.

Instead, judicial activism has an empirical definition that can be understood in both a quantitative and qualitative sense. In a quantitative sense, activism can be measured based on the frequency with which the Court invalidates laws or impacts government policy. A deferential court that never overturns government decisions is not activist, a court that always does so is the most activist. As political scientists like Christopher Manfredi argue, judicial activism can be seen as being on a spectrum. Our Supreme Court is "activist" in about 35 percent of Charter cases.

But saying that does not make a claim about whether this level of activism is inappropriate or desirable. Indeed, given the whole purpose of the Charter of Rights, a completely "restrained" Court would arguably be as problematic as one that is constantly making policy. Whether the Court is "too activist" is a normative judgment that people are free to argue about. But under this definition, to say that activism is meaningless or does not exist would be incorrect.

The Court can also be activist in a qualitative sense. Take the Court's decision in the InSite case, involving Vancouver's supervised drug-injection facility. The federal government sought to shut InSite down by refusing to extend an exemption for the facility under the Controlled Drugs and Substances Act. The Court ruled that this particular decision by the health minister violated InSite's clients' right to life, liberty and security of the person by imposing increased risks of harm. But the Court did not declare that the general use of the minister's discretion was unconstitutional. It did not strike down any part of the law. Nor did it order other provinces to open their own supervised injection facilities. Thus, even in the context of a particular decision, a Court might be more or less activist in its reasoning.

Judicial activism is a tricky concept, and it is often used in completely subjective ways. The public debate about judicial power is incredibly important precisely because the Court wields so much policy influence. A lot of the time charges of "activism" do not seem particularly helpful in clarifying the terms of that debate. A big problem is that the Court's critics and critics of judicial activism are both wrong, albeit in opposite directions. The former think that judges should just stick to "the law," as if that were possible, while the latter think the Court's decisions are only about the law because the policy consequences are merely the result of what the constitution means.

Dismissing the notion of judicial activism entirely is to deny that judges have the discretion—which they invariably exercise—to act with more or less deference to the

decisions of democratically elected governments. In this sense, the concept itself remains useful and important.

Former justices, PMs express concern over lack of anti-terror oversight

CTV NEWS, February 23, 2015

As a sweeping anti-terrorism bill winds its way through Parliament, former prime ministers and former Supreme Court judges are expressing concerns that Canada's security agencies don't have adequate checks and balances.

Last week, Parliamentarians debated Bill C-51, which gives more sweeping investigative powers to Canada's security agencies, including the Canadian Security Intelligence Service.

Opposition Leader Tom Mulcair said last week that the NDP will not support the legislation, calling it "dangerous" and "over-reaching."

The NDP are not the only ones concerned that the legislation does not boost oversight of Canada's spy agency.

In an open letter published last week by The Globe and Mail, former prime ministers Joe Clark, Jean Chretien, John Turner and Paul Martin called for more accountability and independent oversight for the country's security agencies.

The prime ministers said that a "lack of a robust and integrated accountability regime" makes it difficult to "meaningfully assess the efficacy and legality" of the country's security activities. This absence, they said, could ultimately lead to problems around public safety and human rights.

Former Supreme Court Justice John Major, one of the letter's signatories, told CTV's Question Period that he's "puzzled" at the government's "reluctance" to ensure oversight.

"When we speak of oversight, I don't think any of us think the agencies are going to deliberately extend their reach. But the fact is they have a job to do, they think it's important, they get over-enthusiastic when they think they're hot on the trail of

something, and it's very easy to slip over the edge," Major said. "We've seen it with police forces, we've seen it in the past with CSIS."

Speaking on Question Period, Defence Minister Jason Kenney said that the government is providing protection to civil liberties by ensuring that the additional powers being proposed are vested in the courts.

"The security agencies can go and obtain orders to interrupt potential terrorist activities, to detain a suspected terrorist for up to seven days, but they can't do it on their own, it requires the approval of a judge," Kenney said.

However, Major says there is little worry about procedures where warrants must be granted by a judge.

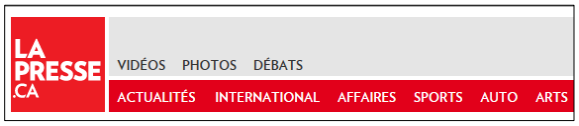
"There's a wide range that these agencies, day-to-day, are engaged in, and it's that part of their activities that's outside courts and provisions that draws some concern," Major said.

Critics are also asking why government doesn't implement parliamentary oversight, similar to U.S., U.K. and Australian systems. Kenney said that the Conservatives feel a "non-political approach" is more appropriate.

"And that's what governments before have felt as well," Kenney said. "That an objective, independent group of experts that are not part of Parliament or politics should be taking a look at the operations of CSIS."

Former Supreme Court Justice Michel Bastarache, who also added his name to the open letter, says there are models that experts feel are superior to Canada's system.

"I think what we're saying is, why not examine what we have in light of what exists elsewhere and see whether we have the best system possible to ensure confidence of the public in the system, but also the image of Canada throughout the world," Bastarache told Question Period.



Loi antiterroriste: des experts craignent des dérives

La Presse, Presse Canadienne, le 23 février 2015

Des experts du milieu juridique craignent que le projet de loi antiterroriste du gouvernement fédéral - qui criminaliserait toute «propagande terroriste» - puisse mener à

des dérives et s'appliquer sur des discours qui n'ont rien à voir avec des menaces violentes.

Selon les professeurs de droit Craig Forcese et Kent Roach, la définition de «propagande» du gouvernement fédéral est «dangereusement» trop large.

Le projet de loi, déposé à la Chambre des communes la semaine dernière, permettrait aux agents de la Gendarmerie royale du Canada (GRC), de réclamer un ordre de la cour pour retirer des sites Internet ce qu'ils considèrent comme de la propagande terroriste.

Dans un rapport déposé lundi, MM. Forcese et Roach disent appuyer le principe du gouvernement. Mais ils croient que la GRC devrait se concentrer uniquement sur les attaques elles-mêmes et sur les menaces.

Le gouvernement conservateur a proposé cette nouvelle loi - qui déléguerait aussi des pouvoirs accrus aux services de renseignements du Canada -en réaction aux attaques du mois d'octobre dernier qui avaient tué deux soldats.

Le projet de loi devrait être présenté en deuxième lecture à la Chambre des communes, lundi.

OTTAWA CITIZEN

Appeal could bring end to judges' dismissing victim surcharge

Andrew Seymour, Ottawa Citizen, February 23, 2015

A defence lawyer raised the spectre Monday of a court system bogged down by needless and lengthy constitutional challenges if a Crown appeal on the controversial mandatory victim surcharge is successful.

Crown prosecutors are challenging two recent decisions in which Ottawa judges refused to impose the mandatory surcharge. In both cases, the judges declined to impose the surcharge without hearing any legal argument. The surcharge is intended to raise funds for victim services.

In refusing to impose the surcharge, the judges said they were persuaded by an earlier Ontario court ruling that concluded the controversial fee put in place by the federal Conservative government amounted to cruel and unusual punishment. That decision, by

Justice David Paciocco in the case of an aboriginal offender named Shawn Michael, is under a separate appeal set to be heard in April.

While the Crown is appealing only two decisions that cite the Michael decision, the tactic has been used by roughly half of Ottawa's judges to avoid imposing the surcharge on anyone, whether they have the money to pay the surcharge or not.

Assistant Crown attorney Julien Lalande told an Ontario Superior Court judge Monday that the result has been a justice system where offenders don't know from one day to the next whether they will have to pay the surcharge, which is supposed to be $100 or $200 depending on the severity of the offence, or an amount equal to 30 per cent of any fine.

Lalande said it has also created a court where two parties — the offices of the provincial and federal attorneys general — are denied both proper notice and the opportunity to make a meaningful legal argument defending the constitutionality of the law.

"Can a provincial court, of its own motion, without proper notice to either of the attorneys general and without any argument declare a law unconstitutional?" asked another prosecutor, Louise Tansey. "This is the legal question that is before this court, and it is the Crown's submission that the simple answer is No."

According to the Crown, the provincial court lacks the jurisdiction to strike down the law. Each and every case requires a fresh constitutional argument, the Crown argued.

But the lawyer for one of the offenders whose decision is being appealed argued that that approach would bury the court in unnecessary constitutional challenges.

"It is a waste of the court's time to hear the same argument again and again and again," said defence lawyer John Hale. "We want justice, but we also want efficiency."

Hale questioned whether the Crown appeal was "a tool to plug the holes in the dike" because the judges' decisions to not enforce the surcharge reduced the amount of money available for victim services.

Hale acknowledged some judges have flatly refused to impose the surcharge as a result of the Michael decision, but he argued that judges often tell the Crown prosecutors where they stand and give them a chance to address the victim surcharge at the start of the day.

"It is kind of sad looking at some Crowns because they look so resigned," said Hale. "They are like the Charlie Browns of the criminal court in front of some judges because they know they are going to pull the football away."

Hale argued that the Crown is aware of the objections to the constitutionality of the law and should be on notice that it might be an issue, particularly in cases involving offenders who lack the means to pay the surcharge. Forcing every offender to bring a constitutional challenge would nullify the effect of the important decision to strike down the law, Hale added.

Ontario Superior Court Justice Julianne Parfett, who will decide whether judges can continue relying on the ruling that found the law unconstitutional, reserved her decision.

LA PRESSE .CA
VIDÉOS PHOTOS DÉBATS
ACTUALITÉS INTERNATIONAL AFFAIRES SPORTS AUTO ARTS

SCRS: les primes au bilinguisme supprimées en douce

Vincent Larouche, La Presse, le 24 février 2015

Pressés de réduire leurs dépenses par le gouvernement Harper, les services secrets canadiens craignaient d'avoir à geler les salaires ou à réduire les effectifs ces dernières années, mais ils ont finalement trouvé une autre façon d'économiser: sacrifier la prime au bilinguisme qui avait été gagnée après une décennie de lutte par les espions francophones, principalement issus du Québec.

C'est ce que révèle une note interne du Service canadien du renseignement de sécurité (SCRS), obtenue par La Presse en vertu de la Loi sur l'accès à l'information. L'organisme d'enquête fédéral est présentement au coeur de la stratégie antiterroriste du gouvernement, qui propose d'ailleurs d'élargir ses pouvoirs.

La missive, datée de juin 2012, est signée par le patron des ressources humaines du SCRS, Mark Cosenzo. Elle annonce la fin de la prime d'environ 800$ par année qui avait été accordée aux agents répondant aux critères de bilinguisme, comme ailleurs dans la fonction publique fédérale.

«La décision d'accorder cette prime était sans doute judicieuse en 2007, mais malheureusement, les circonstances ont changé. Comme vous le savez, les réductions budgétaires et la nécessité de réaliser des économies et des gains d'efficacité sont beaucoup plus importantes de nos jours», précise M. Cosenzo.

Déception anticipée

La prime avait été accordée en 2007 après que des agents, principalement des Québécois francophones, eurent poursuivi le SCRS devant la Cour fédérale et monté une fronde interne rarement vue dans le milieu du renseignement.

Dans sa lettre, le responsable des ressources humaines anticipe d'ailleurs une résurgence de la grogne au sein des troupes.

«Certains d'entre vous seront sans doute déçus, mais je tiens à vous assurer que cette décision n'a pas été prise à la légère. Elle découle directement du Plan d'action pour la réduction du déficit et des responsabilités financières imposées au Service dans le dernier budget fédéral», écrit-il dans une référence directe aux politiques des conservateurs.

«Comme les changements apportés aux indemnités de travail, l'annulation de la prime au bilinguisme permettra au Service de continuer à respecter les obligations définies dans son mandat sans avoir recours au gel des salaires ou aux mises à pied», poursuit la note. La Presse a cherché à savoir quels étaient les changements en question apportés aux indemnités de travail. Le SCRS n'a répondu à aucune question.

La lettre insiste par ailleurs sur le fait que «le Service n'a jamais été aussi bilingue». Elle évoque une «sensibilisation accrue grâce à des événements comme la Journée de la dualité linguistique et la Semaine de la diversité».

Deux mondes

«C'est vrai que ça a chialé à l'époque. Mais ce qu'on se disait aussi, c'est qu'il y a bien des employés anglophones qui avaient la prime et qui ne parlaient pourtant pas vraiment français!», se souvient Dave Charland, un agent récemment retraité du SCRS.

«Il y a deux mondes au SCRS: Montréal et le reste. À Montréal, tout le monde comprend le français. Mais ailleurs, il y a du monde à qui tu envoies un rapport en français et ils ne comprennent rien», raconte-t-il.

Au bureau du ministre de la Sécurité publique Steven Blaney, le porte-parole Jean-Christophe Delerue n'a pas voulu discuter des compressions imposées aux services de renseignement. «Le SCRS est fier d'avoir un effectif bilingue et diversifié et il est déterminé à favoriser le bilinguisme au travail de toutes sortes de façons», a-t-il toutefois indiqué.

Du côté du NPD, la députée Rosane Doré Lefebvre accuse le gouvernement d'avoir trop réduit le financement du SCRS. «C'est sûr qu'il y a eu des impacts considérables sur le terrain. Je trouve triste qu'ils n'encouragent pas le bilinguisme dans un pays où il y a deux langues officielles et dans un service où c'est important d'avoir les deux langues», dit-elle.

---

thestar.com

Toronto students win court challenge over prom breathalyzer test

In a precedent-setting decision, the Superior Court rules that Northern's pre-dance breath testing violates constitutional rights.

Olivia Carville, Toronto Star, February 24, 2015

In a precedent-setting decision, two Toronto high school students took their principal to court and won the battle against mandatory breath testing at prom.

The Northern Secondary School students petitioned the court after their principal, Ron Felsen, demanded compulsory breathalyzer tests at last year's prom.

The Superior Court ruled in the students' favour on Monday, stating mandatory breath testing would infringe on their constitutional rights.

In a lengthy ruling, Justice Susan Himel said the students had a reasonable expectation of privacy and school authorities do not possess reasonable grounds to conduct this type of search and seizure.

Jonathan Lisus, the civil litigation lawyer who acted on behalf of the students' pro bono, said the ruling was about more than just alcohol at school proms — it has cemented the fact that the charter, the supreme law of the land, applies to school authorities.

Never before have the courts ruled on the application of the Canadian Charter of Rights and Freedoms in regard to the relationship between schools and students, Lisus said.

"This was an important confirmation of the role of the charter in a free and democratic society," he said.

The case began in April 2014, when Felsen decided to roll out compulsory breath testing at prom without consulting the school council.

Speaking to the Star Monday night, Felsen said he had been "hopeful for a different outcome," but that he respected the court's decision.

At the time, Felsen said he was introducing mandatory breath testing as a "last resort" to counteract a culture of intoxication at school dances, which had seen two of his students hospitalized in recent years.

Students Brett Gorski and Simon Gillies, the president and vice-president of the school council, disagreed with the decision.

Offended that Felsen had not consulted the student body first, the pair began to research how mandatory breath testing might impinge on their rights.

They contacted the Canadian Civil Liberties Association for guidance and were connected with Lisus, who helped them file a charter application against Felsen and the Toronto District School Board last May.

As the case was before the courts, Northern Secondary School decided not to enforce breath testing at the 2014 prom. Gorski and Gillies attended the dance and no student was kicked out for being intoxicated.

Gorski, 18, told the Star she was "thrilled" with the ruling.

Speaking over the phone from Montreal, where she is now studying for a management degree, Gorski said the decision was a triumph for the whole student body.

"Students deserve to know that they have rights and, despite their age, they have the power to defend themselves," she said.

Lisus said Gorski and Gillies were “terrific poster boys and girls” for the way society should responsibly raise fundamental questions of fairness.

“These kids didn’t act out or misbehave; they brought this important issue to the courts in a reasonable way and got a ruling that will apply throughout the province,” Lisus said.

“That is exactly the kind of behaviour we should be encouraging in our young people and that is exactly the reason why we shouldn’t be applying mass randomized searches to students. It’s the wrong way to teach them about fundamental values and the way to resolve differences of opinions in democracy.”

Felsen wrote a letter to the school community Monday evening outlining the court’s decision and stating that Breathalyzers would not be used at any upcoming proms.

The decision to enforce mandatory breath testing was not only meant to identify those who were intoxicated, but to also act as a deterrent, Felsen told the Star, adding he always had the students’ best interests at heart.

“We want students to enjoy themselves at prom, but we have to make sure they are enjoying themselves within the law,” he said.

Constitutional lawyer Clayton Ruby, who was not involved in the case, applauded Gorski and Gillies for having the courage to fight their school.

“At that age, singling yourself out and taking a stand against the authorities is really a brave thing to do.”

“The school may think this is in the students’ best interests, but ultimately the students get to decide. They are subject to the same rights as everyone else,” Ruby said.

NATIONAL Legal Insights & Practice Trends | THE CANADIAN BAR ASSOCIATION INFLUENCE. LEADERSHIP. PROTECTION.

ABOUT US | FEATURES | BLOGS | THE PRACTICE | CONTRIBUTORS

After Carter v. Canada

What’s next for federal lawmakers?

BY JOCELYN DOWNIE, National Legal Insights & Practice Trends (Canadian Bar Association), February 26, 2015

When it recently struck down the Criminal Code prohibitions on physician-assisted dying, the Supreme Court of Canada gave federal and provincial legislatures 12 months to craft new legislation to meet the conditions set out in its landmark ruling. Of course, the legislatures could do nothing, just as they did after the SCC struck down the criminal

law on abortion years ago. But this would mean that, as of February 6, 2016, physician-assisted dying would be legal in Canada for those individuals who meet the criteria set out by the Court (subject to the general regulation of health services)

I leave the assessment of the political wisdom of choosing this path to the political scientists and strategists. Here, I simply explore what the next steps for federal lawmakers would be if Parliament were to decide to legislate in an effort to respect the SCC decision and reflect the will of the electorate. The obvious questions then are: "what should this legislation contain?" and "how should the federal Parliament go about legislating on the issue of physician-assisted dying?"

As stated in Carter, the Criminal Code prohibitions on physician-assisted dying are void "insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition. 'Irremediable', it should be added, does not require the patient to undertake treatments that are not acceptable to the individual." These criteria for access could, quite straightforwardly, be reflected in a Bill reforming ss.14 and 241(b) of the Criminal Code.

However, a number of questions remain unanswered.

First, should the criteria for access be broader than those set out by the SCC? Some have suggested that competent adults should be able to access physician-assisted dying through advance directives (commonly known as "living wills" or "durable powers of attorney for health care"). This suggestion is often made with reference to those diagnosed with Alzheimer's disease and other forms of dementia. Some have suggested that mature minors should also have access – just as they are now sometimes permitted to refuse life-sustaining treatment. Should the legislation have a residency requirement or should individuals who come from other countries be able to access physician-assisted dying in Canada?

Second, what procedural safeguards should be put in place? Must two physicians be involved or is one sufficient? How much time must pass, if any, between the time of request for assistance and the provision of assistance? And, must a committee, special tribunal, or a judge review the request?

Third, what oversight system should be put in place to monitor physician-assisted dying in Canada? Should physicians have to report all cases of assisted dying, and if so, to whom? What information should be reported (e.g., demographic information, medical conditions, reasons for accessing assisted dying)? Should the body receiving reports issue annual reports to the Canadian public? And what structure rests in between insufficient controls and overly burdensome bureaucracy?

Fourth, how do we reconcile the Charter rights of patients (life, liberty, and security of the person – accessing assisted dying) and physicians (conscience – refusing to participate in assisted dying)? The SCC said explicitly in Carter that "nothing in the declaration of invalidity which we propose to issue would compel physicians to provide assistance in dying. The declaration simply renders the criminal prohibition invalid. What follows is in the hands of the physicians' colleges, Parliament, and the provincial legislatures." So should physicians have a duty to provide assistance? Should they have a duty to refer? Should institutions (as opposed to individuals) be allowed to refuse to provide assistance?

Finally, can we take the process of legislating on physician-assisted dying as an opportunity to improve end-of-life care more broadly? Can we tie opening access to assisted dying to improving access to palliative care (as happened in Quebec and Belgium)? Can we clarify the legal status of unilateral withholding and withdrawal of potentially life-sustaining treatment and palliative sedation? Can we establish advance directives registries?

These are all challenging questions. Fortunately, Parliament does not have to start from scratch in trying to answer them before the SCC's declaration of invalidity takes effect. Lessons about content can be drawn from the experiences of jurisdictions that have permitted and regulated assisted dying for many years (e.g., the Netherlands and Oregon) and from the careful reviews of the issues conducted by the Royal Society of Canada Expert Panel on End of Life Decision-Making and the Quebec National Assembly Select Committee on Dying with Dignity.

Lessons about process can be drawn from the recent experience in Quebec. In developing An Act respecting end of life care, the Quebec National Assembly engaged in a remarkably non-partisan and highly consultative process. This process resulted in legislation that has extremely strong support across party lines and throughout the Quebec population and precisely the kind of legitimacy needed for legislation on such a significant social issue.

In a motion introduced on February 20, 2015, Justin Trudeau called for the appointment of a special committee to "consult with experts and with Canadians, and make recommendations for a legislative framework that will respect the Constitution, the Charter of Rights and Freedoms, and the priorities of Canadians." This committee could take draft legislation that has already been proposed, revise it as needed to make it consistent with the SCC decision in Carter and the results of the committee consultations. The committee members could also make an explicit commitment to conduct their business in a non-partisan manner.

Ideally, the federal Parliament would also work with the provinces and territories as well as the health regulatory bodies to ensure that all of the interdependent systems that will have an impact on physician-assisted dying (including any legislation the federal

Parliament is seeking to introduce) work as efficiently and consistently as possible. Cooperation and collaboration across jurisdictions and sectors is essential.

Within the next year, federal lawmakers could dramatically improve end–of-life care in Canada. But we are left with one final question – is there sufficient political will to do so?